COMMON LAW MARRIAGE IN OHIO*

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By its decision in *Umbenhower* v. *Labus*‡ in 1912, the Supreme Court of the State of Ohio upheld the validity of a common law marriage contracted in that State. Certain rules were laid down by the court to govern such recognition. The parties must be competent to enter into the marriage contract and do so by words of present consent to be followed by cohabitation as husband and wife. There must also be a holding out to the community in which they reside that such a relationship exists.

Following this authoritative statement of the law, two cases were decided. The first, *Walker* v. *Walker*,[64] assigned a dower interest to a common-law wife despite testimony to the effect that she had had doubts at its inception and through all her married life that the union was lawful. These doubts were shared by her neighbors. These misgivings were immaterial, the court held, in view of the fact that the parties had entered into an oral contract in the presence of a witness and that from the time of said agreement they had lived together as husband and wife. " . . . all the actions and statements of Abraham Walker were to the effect that she was his wife; that the child born was his own daughter, and in his will he treats her as his daughter and gives her the bulk of his estate. . . . it seems to the court, under all these circumstances, it would be an outrage and a great wrong to hold otherwise than that Amanda Whitney was the common-law wife of Abraham Walker."

* This is the second part of Miss Moynahan's article. The first part appeared in the fall issue. 5 O.S.L.J. 26.

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‡ 85 O.S. 238, 97 N.E. 832 (1912), see note 53, Part I.

[64] 15 O.N.P. (N.S.) 189; 28 O.D. (N.P.) 391 (1913).

The second 1913 case, *Erie Railroad* v. *Dump*,[65] held that it was no error for the trial court to allow a child by a common-law marriage to be made a party in an action to recover damages for death caused by negligence, although the petition filed by the administratrix against the railroad company had alleged that the deceased was unmarried and left no children. The statute permitting a death action gave no protection to next of kin omitted in the pleadings, but, said the court of appeals, "to hold that the law will not allow such next of kin to intervene and set up their claim would be to turn the statute, in some cases, from a beneficient one, designed to aid in the administration of justice, into an engine of oppression." The court held that the interests of actual beneficiaries should be protected at the trial.

Charrier v. *State*,[66] decided in 1918, originated in a criminal prosecution for adultery, and was the occasion for a learned and witty opinion by Judge Grant of the Court of Appeals. The accused had appealed his conviction and sentence through the courts of probate and common pleas to the higher tribunal. He offered no evidence on his own behalf before either the trial or appellate courts, claiming that the State had not proved its

[65] 2 O. App. 210, 21 O.C.C. (N.S.) 300 (1913).

[66] 29 O.C.C. (N.S.) 97, 30 O.C.D. 578 (1918). The accused, a native of France, had been domiciled in the United States for some two years and in 1917 had contracted a statutory marriage in Ohio, which the State claimed to be meritricious because he had cohabited in France with another woman, the prosecuting witness at the trial, under such circumstances and holdings out as would constitute a so-called "common-law marriage" as understood and allowed in Ohio. The testimony of the alleged French wife was to the effect that she had met and cohabited with the accused in Paris on the promise that "he wouldn't marry her right away," though he had later assured her that "you are my wife *now*, and your daughter" (by a previous meretricious relationship) "is my daughter." They began to call each other husband and wife and lived together as such, the union resulting in the birth of a child. With the two children the couple had later emigrated to Canada, holding themselves out as a family, and with the constant promise by the man that he would have a religious marriage ceremony performed, which he continually postponed owing to financial difficulties. In 1915 he abandoned her and coming to the United States contracted the formal marriage made the basis of the prosecution.

case. Judge Grant gave a detailed and lucid exposition of the institution of common-law marriage, tracing its origin in canon law and adoption by the common law of England, noting that it was unaffected by the decrees of the Council of Trent, and at the time of the separation of England and the American Colonies became the common law of the United States. The court pointed out that the institution had continued in England until its validity was denied in the *Queen* v. *Millis* by reason of Lord Hardwicke's Act in 1753, which, however, had never applied to the English colonies, and stated that "It follows that the common-law marriage institution, brought from England by our ancestors, has full standing in the courts of such of the United States today as have not denied it by statute."

Concluding, however, that under all the authorities the validity of a marriage is determined by the *lex loci* where contracted, the court, at page 106, summarized the issue raised by the appeal as follows:

> We have then, this state of things: A relation in France which when first established offended the received notions of morality and so was meretricious. From this arises the presumption that the connection continued to be meretricious until proof is forthcoming that the cohabitation became lawful, the burden of repelling this presumption by proof removing it being cast upon the claimant of a legal relation. We have, further, the fact of history that the common law of England, or its equivalent in jurisprudential value, never was the law of France.
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> And we have the legal corollary that the relation of this man and this woman, established in Paris, in Ohio stands loaded with whatever legal shortcomings and infirmities existed by virtue of the laws of France at the time it was entered into. If that relation continued to be meretricious up to the time when it was ended, and was not at any time a lawful cohabitation, then a lawful marriage of one of the parties to a third party, with its physical consummation, could not be the source of the adulterous intercourse denounced by the statute under which the accused is here prosecuted.

Reversing the judgment of affirmance by the court of common pleas, and rendering a judgment of acquittal on the facts and the law, the court stated at page 110:

Our conclusion is that, within judicial knowledge, as a fact of history, the relations and conduct of the parties in France relied on by the state to establish a marriage at common law, were insufficient to operate that effect, in contemplation of the law of that country, by which the validity of the claimed marriage is alone to be measured and tested. To the benefit of this conclusion the accused was, and is entitled.

Allen v. *Allen*,[67] decided in 1923, is interesting. The decisions applied the precedent of the recognition by Ohio law of the validity of a common-law marriage "notwithstanding none of the formal legal requirements have been complied with," in an action to annul a marriage on the ground that the female contracting it had not obtained her father's consent thereto as provided by the statute. The bride was within the age limit requiring such consent, but above the age fixed by the Legislature for entrance into a contract of marriage. The ceremony had been followed by cohabitation and the court held the marriage valid.

Days v. *Thompson, Admr.*[68] reached the higher court on appeal from the court of common pleas' judgment that a common-law marriage had not been established by the evidence. The case is briefly reported in the Law Abstract although a court of appeals decided against the administration of the estate of a deceased woman by a man seeking to obtain title to certain property as her common-law husband. The original relationship would appear to have been meretricious, and the presumption that it so continued was not overcome by the evidence. The court's opinion in affirming the judgment appealed from is summarized and sets forth the recognized principles governing the recognition of a common-law marriage in Ohio.[69]

[67] 21 O. L. Rep. 313 (1923).
[68] 3 O. L. Abs. 634 (1925).
[69] The enumeration follows:
1. While the General Code provides certain regulations as to the exercise of the right to marry, it does not prohibit marriage under the rules of the common law.
2. "An agreement of marriage *in praesenti* when made by parties competent to contract accompanied and followed by cohabitation as hus-

The opinion of the appellate court in *Dirion* v. *Brewer, Admr.*[70] was one of three written by Vickery, P. J., between 1925 and 1931 in cases involving common-law marriages. Two of these decisions were affirmed by the Supreme Court's refusing to compel the court of appeals to certify its record, although one decision[71] denied and the other[72] upheld the disputed status. In the third case,[73] Judge Vickery disagreed with his colleagues, and wrote a dissenting opinion that was published in the Ohio Law Reporter.

In all three cases the original relationship had been illicit, and the evidence presented in each afforded the learned court an opportunity to particularize the kind of proof necessary to establish a common-law marriage as against the presumption that the union continued as it had begun.

The *Dirion*[74] case was a proceeding brought against the administrator of the estate of Henry F. Sheips to establish the plaintiff's legitimacy for purposes of inheritance. The record on appeal showed that Sheips, when a mature man, had cohabited with Josephine's mother, the latter being then about sixteen

band and wife, they being so treated and reputed in the community and circle in which they move, establishes a valid marriage at common law and a child of such marriage is legitimate and may inherit from the father."

3. *A* common-law marriage, however, rests on contract. It is not a promise to be performed in the future, but must be the result of an agreement to take effect *in praesenti.*
4. When such contract is entered into it may be proved "by competent parol proof and circumstances when the degree of proof is clear and satisfactory to the court or jury."
5. When persons have lived together illicitly for many years, as the evidence herein disclosed, the presumption is that such an arrangement continued.
6. The judgment is not manifestly against the weight of the evidence, and no error exists prejudicial to Days.

[70] 20 O. App. 298, 151 N.E. 818 (1925). Motion to certify record overruled in 23 O. L. Rep. 589.

[71] *Lumas* v. *Lumas*, 26 O. App. 502, 160 N.E. 480 (1927). Motion to certify record overruled in 25 O. L. Rep. 638.

[72] *Dirion* v. *Brewer*, note 70, *supra.*

[73] *Duhigg* v. *Duhigg*, 31 O. L. Rep. 600 (App. 1929), note 80, post.

[74] Notes 70-72, *supra.*

years of age. Although he thereby laid himself open to statutory charges, these were not pressed by the family of the girl, Carrie Koop. Instead and before the plaintiff's birth, Sheips had assured her elder sister that he would marry Carrie and his language to that sister was quoted in proof that he had carried out the agreement. "Didn't I do as I agreed when I said I would marry your sister," which the court held justified the inference that a marriage had taken place.[75]

The couple continued to live together and were recognized in the neighborhood as man and wife; the deceased acknowledged the child Josephine as his daughter.

Addressing itself to the theory that a common-law marriage between the parties had been sufficiently established by the evidence to remove the presumption that a meretricious relationship continued, the court ruled that the proof of cohabitation and reputation submitted should be considered sufficient, although the court of appeals in the Third Circuit, the *Bates* v. *State*[76] decision, had ruled that such proof under the statute[77] was applicable to divorce matters only. Said the court:

> I presume he meant that it did not apply to criminal matters, but if that statute makes proof of cohabitation and reputation sufficient to establish a marriage that may be dissolved, with much more reason

[75] In further comment on the evidence the Court said:

"We have the evidence of the girl's mother, which the lower court ruled out, but which we think is competent, being an exception to the hearsay rule, as it is the statement of a deceased ancestor relating to the birth of a child. Before she died she was cognizant of what might be said about her daughter, and she in effect said this:

> 'Don't let them tell Josephine that she is illegitimate because I say to you that we were married before Josephine was born,'

which, if true, established that Josephine was born in lawful wedlock. And there is not any evidence in this record that disputes that proposition or the proposition that the father made to the aunt of this girl that he would and had married her."

[76] Note 10, *supra*.

[77] The old Revised Statute, section 5698 (now section 11989, General Code, 51 Ohio Laws, p. 379, sec. 6) provided:

> "Proof of cohabitation, and reputation of the marriage of the parties, is competent evidence to prove such marriage, and within the discretion of the court, may be sufficient evidence therefor."

should that rule apply when it comes to a question of making legitimate or bastardizing an innocent product of such relationship.

The *Bates* decision was held offset by *Carmichael* v. *State*, a Supreme Court decision, which had been followed by other Ohio cases fully recognizing a common-law marriage status.

This case is also authority for the proposition that the law favors legitimacy, and will indulge in all presumptions to carry out that presumption and make the child legitimate. The court held "that at some time before the birth of the plaintiff her father and mother were married and that she therefore was a legitimate child, and is entitled to inherit from her father."

In *Lumas* v. *Lumas*[78] the evidence relied upon to prove a common-law marriage was not considered convincing by Judge Vickery under the rules he had laid down in the *Dirion* case. The judgment of the common pleas court awarding plaintiff alimony in her divorce action was reversed and judgment entered for the defendant.[79]

The third case, *Duhigg* v. *Duhigg*,[80] in which Judge Vickery wrote a strong dissenting opinion to the affirmance by the Court of Appeals of a judgment granting divorce and alimony to a

[78] 26 O. App. 502, 160 N.E. 480 (1927), note 71, *supra*.

[79] It appeared from the evidence in this case that at intervals between two marriages and divorces from other men the plaintiff and defendant had had illicit relations. During a residence she had established in Cleveland he had lived for some time as a boarder in her home. On the trial of this present action of divorce from Lumas, the lower court found that she had become the common law wife of the latter some time between January 22, and July 1, 1922. The testimony was conflicting. The defendant testified he had never lived with this woman as her husband under an agreement or understanding, either express or implied, from which the marriage relation would result. The woman's grown children coming home one time found them living together and he asked "How do you like your new father?" Instances were given where he introduced her as his wife and acquaintances testified that they lived together. Other evidence in the neighborhood indicated that they were not known as husband and wife. Subsequent to so-called marriage she signed deed as single woman to convey real estate, using name of her first husband. The defendant also deeded property as a single man apparently with her knowledge and consent. The rights of third persons would therefore be affected in holding this relationship common law marriage.

[80] 31 O. L. Rep. 600 (App. 1929); note 73, *supra*.

woman claiming the status of a common-law wife. The evidence was held insufficient to overcome the presumption that the original meretricious relationship continued during the so-called marriage. The parties had never lived together in a common home, the woman, going under the name of Mrs. Dunn, had rented a room in a boarding house where the man visited her and was known as Mr. Dunn, although he kept separate rooms of his own under his proper name of Duhigg. As the result of the relationship a child had been born, the father contributing to its support and that of the mother for several years before entering into a ceremonial marriage with another woman. It was not until these contributions ceased that the claim of a common-law wife was asserted by the plaintiff. The decision of the majority of the appellate court is not reported and the evidence upon which the status was upheld is not apparent.

When in 1931 the case of *Schwartz* v. *Schwartz*[81] reached the appellate court, Judge Vickery, who by now felt that he had sufficiently championed the cause of common-law marriage in Ohio, delivered himself in no uncertain terms of a rejection of the evidence[82] presented to him in support of an alleged common-law marriage in what he truly called an "amazing situation!"

> Ohio has gone as far as any state in recognizing a common-law marriage. This member of the court has gone as far as any other court

[81] 35 O. L. Rep. 66 (App. 1931).

[82] The plaintiff, Anne Louise Grossman, had been awarded alimony and counsel fees in the common pleas court on the claim of a common-law marriage with Ferdinand Schwartz, who had denied both the promise of marriage and cohabitation. In as much as it was her word against his and the evidence disclosed no evidence of cohabitation, no agreement to live together as husband and wife, merely a series of letters between the pair in which the terms "Hubby" and "Wifie" were used *ad nauseam*. The court held that these terms of affection were neither discriminate nor important. The record indicated that while the couple were attracted toward each other and had probably thought of marriage in the future when Schwartz had graduated from medical school and established himself as a physician, there was no actual evidence of their entering into a present contract of marriage, the testimony of the girl's father being held conclusive on that point.

in holding there can be such a thing as a common-law marriage. Ever since the decision in the case of *Carmichael* v. *State*, 12 O.S. 553, that has been the rule, but to establish the relation, there must be clear and convincing evidence. Perhaps if there had been a written agreement, or a contract made in the presence of witnesses, that these persons had been married, proof of cohabitation following such agreement, even though there were no holding out, might be sufficient; but in all the cases that I have had anything to do with the plaintiff has relied upon a "holding out," to a more or less degree in establishing the marriage relation.

. . . the basic principle was found in 12 O.S., *supra*, that in order to constitute a common-law marriage, there must be a clear understanding and agreement to live together as husband and wife. That must be followed by cohabitation following immediately after the agreement. The agreement must be *in praesenti*, and not some time in the future. Then, if after that the parties hold out each other as husband and wife, and the husband pays the bills for the wife, or has a charge account, or they are known as husband and wife, it does constitute a common-law marriage, and then that marriage is just as lawful and just as binding as any other marriage. But to let down the bars and permit such conduct as these persons indulged in to be the basis of a common-law marriage would be making a mockery of marriage, and be contrary to the policy of the State recognizing the sacredness of the marriage ties.

Prior to the decision in the *Schwartz* case, which was discussed at this point because it concluded the series of Judge Vickery's opinion, five other cases had again brought common-law marriages before the Ohio courts.

The first of these was the important *Howard* v. *Central Nat'l. Bank et al*,[83] which originated as follows:

Upon the death intestate of one Harry B. Hulings, a woman known as Maud Hulings was appointed administratrix of his estate on the supposition that she was his common-law widow. Later one Lulu Hulings appeared and reported herself as the widow of the deceased. Whereupon Maud resigned and the bank was appointed administrator *de bonis non* of the estate. A sister of the deceased, Elizabeth Hulings Howard, laid claim to money on deposit on behalf of herself, another

[83] 21 O. App. 74, 152 N.E. 784 (1926).

sister, and three children of a predeceased brother, alleging that her brother Harry left no widow and praying that the claim of Lulu be set aside. Lulu thereupon filed an answer, setting up her claim to be the widow, and the interest of Lulu's grandson, Harry Hulings Schaeffer, was represented by its guardian, the Pennsylvania Trust Company of Pittsburgh. The Central National Bank requested a ruling by the court on the conflicting claims of the parties. The trial court found that a common-law marriage had existed between Lulu and Harry, and that Harry Hulings Schaeffer was their surviving grandson and entered judgment accordingly.

On appeal this judgment was affirmed and a subsequent motion to certify the record was overruled by the Supreme Court of Ohio.

Inasmuch as the alleged marriage was consummated in Pennsylvania, its validity depended upon the laws of that State, which recognized common-law marriage upon proper proof thereof. Both Ohio and Pennsylvania were in accord that such proof may consist of "reputation, declarations and conduct." Irrespective of the testimony of a surviving party to the contract of marriage,[84] she not having testified that the ensuing

[84] Lulu's testimony was that after a short acquaintance Harry had induced her to break off an engagement to another man and promise to marry him. After some months he proposed that they live together as man and wife without a religious ceremony. At first she said she refused, but finally consented. Her testimony continued as quoted from the record.

"Question: What, if anything, did he say about that kind of marriage? A. He said that, and he took my hand and he said, 'Now we are man and wife,' and he kissed me, and after that we went in to my mother—of course he had talked about marriage so much—and he told my mother we had gotten married, and she said she wasn't surprised, and he put his hand on my shoulder, and my mother shook hands with us and kissed us both."

Concerning this testimony the Appellate Court said at page 84:

"The language thus imputed to Hulings, 'Now we are man and wife' is ambiguous. It is not clear whether he means to express his opinion of the legal effect of the proposals . . . or to then and there declare the existence of a marriage relation between the parties. The latter construction is the one that is most nearly in accord with decency."

Pointing out that there was no evidence of secrecy or illicit relationship in their procedure, the court went on to say:

"It is consequently sound public policy to view the language quoted as

cohabitation was meretricious, but merely to an agreement of doubtful import, such evidence is admissible.

The argument that such proof should be resorted to (that is, of cohabitation and reputation)[85] only where there is no direct testimony by one or both of the parties as to the terms of the contract itself, was met by the court's statement that "such rule might well be invoked if it involved no rights except those of the party testifying, and such party so testified that it appeared that no marriage in fact had been consummated."

The court pointed out that in the instant case "We have an infant who is entitled to prove his right to the succession by any and all evidence that tends to establish his mother's legitimacy. He is not bound by his grandmother's inability to reproduce after forty years the identical language that she claims was employed in consummating the informal marriage."

This case also holds that marriage by *verba de praesenti* may be consummated if the man alone expresses them and the woman merely acquiesces. Further, that a delay of many years by the woman in asserting her claim to marriage is not conclusive against her, but only a circumstance to be considered; as was also the evidence of Lulu's mother that they had told her

> describing the then purpose of Hulings to take Lulu for his wedded wife. It would be a grave injustice after these parties had held themselves out as husband and wife, and raised a daughter, held out as legitimate, to permit either of them to take advantage of equivocal language, after that daughter on the strength of her legitimacy had married a young man who would have recoiled from that sort of an alliance, if his prospective bride had been illegitimate. We conclude, therefore, that, when Hulings said, 'Now we are man and wife,' he was declaring his marriage in *verba de praesenti*."

[85] The proof consisted of the neighbor's recognition of Lulu as Mrs. Hulings upon his introduction to her as his wife; of letters from Hulings to Lulu addressing her as "Dear Wife," their joint execution of deeds conveying real estate, and a deposition signed by him to the effect that while he was a resident of Marietta, his wife (Lulu) lived in Pittsburgh. Additional evidence was that on the daughter's birth she received the name of Huling's mother, that she was brought up and married believing herself Huling's child. Surviving members of Huling's family had also attested their trust and confidence in Lulu, his own sisters testifying to their surprise on learning that the marriage between her and Harry had not been solemnized. The foregoing, said the Court, "would of itself be satisfactory proof of the marriage if the testimony of Lulu were not in the case at all."

they had been married by an alderman in Pittsburgh. This last, said the court, if correct, only tends to show that they were ashamed of the unconventional methods adopted by them, and "is not necessarily inconsistent with their informal marriage in fact."

In affirming the judgment, the court repeated the rule laid down by *Umbenhower* v. *Labus*[86] that a common-law marriage in Ohio must be established by clear and convincing evidence.

In *Johnson* v. *Wolford*[87] it was held that a ceremonial marriage, void because the husband, one of the parties thereto, was already married, became a valid common-law marriage upon the death of the first wife and continued cohabitation thereafter. The question arose in a partition suit against the alleged widow.[88] The Supreme Court reversed the judgment of the lower court in favor of the plaintiff and rendered judgment for the widow, holding that "the intent and actual agreement to be married which inhered in the ceremonial marriage innocently contracted . . . will be imputed by the law to the cohabitation after the death (of the first wife) so as to establish a valid marriage at common law."

Citing many cases in support of the conclusions that an illegal marriage innocently contracted becomes valid upon removal of the impediment, the court said, at page 386:

> If the marriage between Johnson and Cora had been other than a ceremonial marriage, or if Cora had known, or had reasonable grounds

[86] Notes 53, 59, *supra*.

[87] 117 O. S. 136, 157 N.E. 385 (1927).

[88] The deceased Johnson had married Cora Frances, named herein as party defendant, by a ceremonial marriage in Ohio and thereafter they cohabited as husband and wife, so continuing until his death. Cora was at the time ignorant of the fact that Johnson had previously married two other women, the first of whom had already been married and the record did not disclose whether her former husband was dead or divorced from her at the time she entered into the ceremony with Johnson. When Johnson married his second wife there was no evidence that he had secured a divorce from the first, although the second thereafter obtained a divorce from him based on the validity of that marriage. The first wife died about a month prior to Johnson's death and there was conflicting testimony as to whether or not Johnson and Cora knew of her death.

to believe, that Johnson had a wife living at the time of that ceremony and had proceeded in disregard of such knowledge or belief, or if she had learned at any time during the period of their cohabitation that Johnson was not competent to contract marriage at the time of the ceremony, or if there had been a separation, whether voluntary or legal prior to the death of Laura . . . or if for any other reason the relation between Johnson and Cora had been a mere meretricious cohabitation, this court would without hesitation hold that there was no valid marriage, even under the rules of the common law, without a new agreement after the death of Laura . . . followed by continued cohabitation.

Holmes v. *Pere Marquette Ry. Co.*[89] was an action brought by the executrix as surviving widow of a deceased switchman, against the employer railroad under Federal Employees Liability Act (45 U.S.C.A., sec. 51-59). The trial court had directed a verdict for the defendant, refusing to permit the plaintiff to testify to the conversation between herself and the deceased as to their "agreement together" to resume the marital relationship, they having previously been married and divorced, on the ground that it would constitute personal communications between husband and wife. Counsel for the executrix had excepted, stating that he expected the evidence would show the agreement, thus saving his case on appeal. The case was reversed and remanded by the Supreme Court, the opinion stating:

Such conversation would not be incompetent as a communication between husband and wife for the reason that they had been previously divorced, and no common-law marriage would exist until after the agreement was made and was followed consistently by the indicia of the marriage relation. The mere fact that there may have been an agreement to live together as man and wife would not be sufficient even if followed by such indicia, unless made *per verba de praesenti*. . . . If such agreement was made, but by words of the future tense, there could be no common-law marriage. The court erred in not permitting the conversation . . . to show whether or not the agreement was or was not made by words of the present tense.

The decision follows authority of *Umbenhower* v. *Labus* in

[89] 28 O. App. 297, 162 N.E. 675 (1927).

the recognition of a common-law marriage upon proper proof thereof.

Jenkins v. *Jenkins*[90] was another partition action commenced by the heirs of one Alfred Jenkins to divide his real estate. Alma Diehl Jenkins, one of the defendants, claimed dower on the premises as widow of the deceased, alleging also that as she had furnished part of the purchase money, the decedent held the title in trust for her. This second claim was disallowed by the Court of Appeals, but the contention of Alma Diehl Jenkins that she was the common-law wife of Alfred was upheld on the authority of *Johnson* v. *Wolford*[91] and *Dirion* v. *Brewer, Admn'r.*[92] The evidence disclosed that both parties had been previously married; that the deceased had abandoned his wife Lista, the mother of the three children involved in the partition action and left Virginia with the defendant Alma, then the wife of Diehl. They came to Ohio and lived and cohabited as husband and wife for more than 30 years. Shortly after the couple left Virginia, Diehl secured a divorce from his wife Alma, but Lista, the former wife of Jenkins, lived in Virginia until her death in 1923. In Ohio Alma and Alfred were universally recognized as husband and wife and had purchased the land involved in this action, the deed being taken in Alfred's name; they worked the land together to complete payments. "There is some testimony tending to show an agreement on their part to become husband and wife" but impediment existed in the fact that Lista was still living.

The Appellate Court ruled that "In view of the facts and circumstances shown in this case, establishing the long-continued relations between the parties, showing that they resided and cohabited together as husband and wife, and held themselves out to their friends and neighbors as such, which continued down to the time of the death of Alfred Jenkins, and until after all

[90] 30 O. App. 336, 164 N.E. 790 (1928).
[91] Note 87, *supra.*
[92] Notes 70, 72, 74, *supra.*

impediments to their marriage had been removed, and in view of the added fact that there is testimony tending to show an agreement in the present tense to become husband and wife, this court is forced to the conclusion that a common-law marriage existed between them, and that Alma Diehl Jenkins is the widow and entitled to dower in the premises involved in this action."

In *Gillmore* v. *Dorning*[93] the appellate court refused to recognize a common-law marriage although the relationship had existed for a dozen years, the evidence disclosing, however, that no attempt had been made to establish a home or a holding out to the public as man and wife.[94] It affirmed the judgment of the Common Pleas Court, to which court the cause was appealed from a decision of the Probate Court, holding that no common-law marriage had been established and that the person appointed as administratrix of George T. Gillmore, deceased, was not his widow. The question in review before the higher court was whether the holding that no common-law marriage existed was clearly against the weight of evidence. The court held that, though conflicting, the evidence was sufficient to support the judgment that no marriage existed. The evidence, in other words, did not meet the test of a marriage *in praesenti* followed by cohabitation and reputation, as laid down for such marriages

[93] 31 O. L. Rep. 588 (1930).

[94] The evidence disclosed no ceremonial marriage, no witnesses present because the decedent was allegedly "constitutionally against" the marriage service, although seemingly ritualistic form of words was adhered to. No valid reason was given for failing to establish a home; they lived separate and apart for twelve years except for occasional week ends together in Cleveland. The woman carried on business in her own name by a former marriage and as Mrs. Mabelle Beier executed a chattel mortgage. Indeed the only occasions on which Gillmore had introduced her as his wife were when such introductions appeared forced upon him. At his funeral Mrs. Beier had told the nurse that she was engaged to marry him but that the marriage had never taken place. She had even denied that she was Mrs. Gillmore but as Mrs. Beier had guaranteed with the brother of the deceased to pay certain incidental funeral expenses.

in the *Umbenhower*,[95] *Johnson*,[96] *Lumas*[97] and *Jenkins*[98] cases. The court also referred to the ruling in *Howard* v. *Central Nat. Bank*[99] that a common-law marriage must be established by clear and convincing evidence. The fact that there had been no illicit relations before the alleged marriage took place did not alter the necessity, in proving a common-law marriage, that "there must be a meeting of the minds, a mutual contract followed by living together as husband and wife to the extent, as in other marriages, that the ceremony and acts have become a matter of repute in the vicinity and community where the parties resided."

State ex. Judd v. *Huber*[100] was an original action in mandamus to compel payment of a monthly pension to the widow of a deceased policeman. The Board of Trustees of the fund had denied the widow's original application on the ground that she was not the wife of Lucius Judd at the time of his retirement from the police force. It appeared that under the by-laws and regulations a lump-sum had already been allowed her as his widow upon her written statement in applying therefor that she had been married to Judd after his retirement from the Department. In the mandamus action the widow alleged that prior to the ceremonial marriage, which was admittedly eight years subsequent to the retirement in 1912, she and Judd had been united by a common-law marriage since 1902; that by reason thereof she was entitled to the pension. The evidence indicates that while some of their acquaintances recognized them as husband and wife during the earlier period, others had no such knowledge; that though they had been intimate, there had been no common home until after the statutory marriage. The

[95] *Umbenhouer* v. *Labus*, 85 O.S. 238, 97 N.E. 832, *supra*, notes 53-59.

[96] *Johnson* v. *Wolford*, 117 O.S. 136, 157 N.E. 385 (1927), *supra*, note 87.

[97] *Lumas* v. *Lumas*, 26 O. App. 502, 160 N.E. 480 (1927), *supra*, note 78.

[98] *Jenkins* v. *Jenkins*, 30 O. App. 336, 164 N.E. 790 (1928), *supra*, note 90.

[99] *Howard* v. *Central Nat'l. Bank*, 21 O. App. 74, 152 N.E. 784 (1926), *supra*, note 83.

[100] 13 O. L. Abs. 137 (1932).

court held that the ceremony was evidently regarded by the parties as the true marriage. Taken in connection with the widow's own statement above referred to, it was considered strong, if not conclusive, evidence disproving the alleged common-law marriage. "While common-law marriages are recognizable in Ohio, it was incumbent upon the relator to prove the existence of same, by proof of the agreement to such marriage when entered into, the holding out to the public that they are man and wife, and the living together as such. While the relator has introduced some evidence tending to establish these requirements, we are of opinion that the relator's case has been overthrown by the rebuttal evidence . . . The writ is refused."

In 1934, the appeal of *Novaksky* v. *State*[101] sought a reversal for error in admitting testimony of an alleged common-law wife. The man claimed to have procured a marriage license. However, that very fact, said the court, indicated at best that a ceremonial and not a common-law marriage was intended, and "There is nothing in the case to indicate that they at any time entered into an agreement that they should consider themselves and be from that time husband and wife."

In Re Estate of Fred A. Twellman[102] originated in the Probate Court of Franklin County on an application of Leona Twellman, as alleged widow of Fred A. Twellman, to set aside the appointment of Frank Cowden as administrator of his estate. The application was overruled on the court's holding that she was not the legal widow.

It appeared that in 1923 the parties had entered into a non-ceremonial marriage in Missouri, a State which prohibits common-law marriages. Having agreed to become man and wife and living together as such in Missouri, they moved to Columbus, Ohio, in 1926 and continued the same mode of life until they separated in 1929. During the residence period in Columbus, they held church membership as Mr. and Mrs. Twellman,

[101] 18 O. L. Abs. 313 (1934).
[102] 32 Ohio N.P. (N.S.) 201 (1934).

introduced each other and were known to their friends as husband and wife.

On the well-known principle that *lex loci* governs so far as the marriage status is concerned, the court held that since the couple were living in adultery in Missouri, that status accompanied them to Ohio. That in order to legitimate their relationship in the latter State "it became necessary to comply with the laws of Ohio relative to the creation of the common-law marriage status."

Quoting the syllabi in the *Dirion*[103] and *Lumas*[104] cases, requiring clear and convincing evidence to overcome the presumption of continuing illicit relationship, the court said that here Leona Twellman herself gave the only testimony. She stated that when Twellman had given her a ring in Columbus, she had expressed a wish to have a religious ceremony performed, they being church members at the time. He had said it was unnecessary; that they were man and wife "in the eyes of the law and the world." That language in the court's opinion constituted "only a reaffirmance of the relationship which had been existing from 1923 up until the separation in 1929." Moreover, her testimony was considered self-serving, if competent at all. The court, quoting with approval from Judge Hurin's opinion in the *Bates* case,[105] stated:

> It is our opinion that in order to establish a common-law marriage, not only the element of living together, but also the element of a contract, expressed or implied, should be proven by testimony which is clear and convincing.

Only two cases have been found under the Ohio Workmen's Compensation Act that touch on common-law marriage. The first, *Industrial Commission* v. *Terrell*,[106] decided in 1929,

[103] *Dirion* v. *Brewer, Adm'r.*, 20 O. App. 298, 151 N.E. 818 (1925), *supra*, note 70.

[104] *Lumas* v. *Lumas*, 26 O. App. 502, 160 N.E. 480 (1927), *supra*, note 78.

[105] *Bates* v. *State*, 9 O.C.C. (N.S.) 273 (1906), *supra*, note 10.

[106] 120 O.S. 59, 165 N.E. 536 (1929).

merely held that a common-law wife was entitled to the payment of an award.

The second case, decided in 1934, was *Industrial Comm.* v. *Miller*,[107] in which an alleged widow, her original claim having been denied because of insufficient proof of identity, petitioned the Court of Common Pleas for review. From the judgment entered in her favor after a jury trial, the Commissioner appealed to the higher court.

It appeared that the claimant was a native of Jugoslavia, and believing her first husband dead, had married a fellow Slav who later emigrated to this country. At his request she followed him and they lived in Ohio as man and wife for twenty-five years. Two children were born to them and christened as their children. The declarations made by the parents on the latter occasion were considered to be compelling proof of the marriage status.

Although the attorney for the Commission had argued that to constitute a valid marriage it must have been such under the laws of Jugoslavia, the court said it did not consider the question whether the relationship in Jugoslavia constituted a common-law marriage. It seems curious that the case of *Charrier* v. *State*[108] was not cited in this connection, but the Ohio cases relied on by the appellate court were *Dirion v. Brewer, Admn'r*[109] and *Jenkins* v. *Jenkins*.[110]

On these authorities the court came to the conclusion that "regardless of whether there was a common-law marriage in Jugoslavia and regardless of the fact that the relationship in that country may have been illicit, that would not preclude Miller and this plaintiff from consummating a valid common-law marriage under the laws of Ohio after she came to this

[107] 18 O. L. Abs. 244 (1934).

[108] *Charrier* v. *State*, 29 O.C.C. (N.S.) 97 (1918), *supra*, note 66.

[109] *Dirion* v. *Brewer, Admr.*, 20 O. App. 298, 151 N.E. 818 (1925), *supra*, note 70.

[110] *Jenkins* v. *Jenkins*, 30 O. App. 336, 164 N.E. 790 (1928), *supra*, note 90.

country to live with Miller." That status was held to have been established by the declaration and conduct of the parties in Ohio.

The last common-law marriage decision delivered in Ohio before Judge Brewer's opinion in the *Speeler*[111] case, in upholding such a marriage on the evidence presented, went somewhat to the other extreme. The syllabus states that "a common-law marriage contract executed *in praesenti* by competent parties and followed by cohabitation takes on the *sanctity* of a ceremonial marriage," although the court did say that " . . . ceremonial marriage with all the solemnity attending should be encouraged, but when the State does recognize common-law marriages it is important that they may not be easily dissolved." The proceedings in *Knight* v. *Shields*,[112] the case in question, were commenced in the Probate Court of Montgomery County to determine the heirship of the estate of George Maynard Lott. The claimant was found to be the common-law wife of the deceased. On appeal this decision was reversed by the Common Pleas Court, which in turn was reversed by the Appellate

[111] In re Speeler, 6 O.O. 529 (1936), *supra*, note 1.

[112] 19 O. L. Abs. 37 (1935). Matilda Knight (Lott) made a party to the proceedings on allegation that she was the surviving widow of George Maynard Lott, when 17 years old had married one Dean Knight in Knoxville, Tennessee, where both resided at the time. After a union of two months, they separated, Matilda returning to her mother's home and about six years later, in 1912, she claimed to have entered a common-law marriage with George Maynard Lott. They lived in Tennessee, later moving to Cincinnati and Dayton, as man and wife until separation in 1929. They were recognized in Ohio during said period as husband and wife. Insurance policies were placed in evidence in which Matilda was designated as the wife of George. About the time of the separation George caused a criminal charge of bigamy to be filed against Matilda because of the earlier Knight marriage. She was arrested but the case was never pressed and later dismissed. Thereafter and with Lott's connivance Matilda commenced a divorce action against Knight alleging desertion, which was also dismissed. In the Probate Court proceeding Matilda testified that Lott had made the institution of this divorce action a condition to their resumption of the relation they had before the 1929 separation. There was some evidence introduced of the renewal of that relationship for a brief period. But in 1932 Lott married another woman who died that same year, and he himself passed away the following year.

Court and the Probate Court's judgment sustained. The cause was then remanded for further proceedings.

Recognition of the alleged common-law marriage with the deceased turned on the competency of Matilda Knight, to contract it, in view of her earlier ceremonial marriage in Tennessee. The statute[113] of that State provided that a marriage might be dissolved for the purpose of entering into a second, if the party to the first marriage after an absence of five years was not known by the other to be alive. The Court of Appeals held that under this statute and upon Matilda's testimony that she had not heard from Knight since his desertion of her two months after their marriage in 1906, the earlier marriage had been dissolved before she entered into the common-law marriage with George Maynard Lott in 1912. While there was some conflict in the testimony, the court did not think it justified the reviewing tribunal in reversing the decision of the Probate Court as against the manifest weight of evidence.[114]

[113] Secs. 8411, Williams Tenn. Code (1934), "A second marriage cannot be contracted before the dissolution of the first. But the first shall be regarded as dissolved for this purpose, if either party has been absent five years and is not known to the other to be living." (1829 Ch. 23, sec. 16).

[114] Citing the leading decisions on the status of common-law marriage in Ohio, the court pointed out that in the *Bates* case only had its validity been doubted, and concluded as follows: "It is essential to the consummation of a common-law marriage that the contract be *in praesenti*. By this is meant the language used must be susceptible of the construction that the marriage then and there exists and not an agreement to marry in the future. It must be consummated. A mere cohabitation is not sufficient, but under the law of Ohio cohabitation must follow the contract *in praesenti*. It must not be for a limited period of time but the contract must contemplate a continuance during life. When such contract is executed *in praesenti* followed by cohabitation, it takes on the sanctity of a ceremonial marriage and can only be dissolved by death or divorce. Mere separation does not dissolve the marital relation either in ceremonial or common-law marriage. A contractual common-law marriage like all other contracts is controlled by the law of the place where made. If the State where the claimed contract is entered into does not recognize common-law marriages, the same would not be recognized in this State on the contract alone. Applying this principle to the instant case it must follow that since common-law marriages are not recognized in the State of Tennessee except for a limited purpose, they will not be recognized in the State of Ohio except upon the same limited basis unless on other and further showing than the mere contract claimed to have been executed in Tennessee. The recital

Although decisions had been submitted to show that common-law marriages were illegal in Tennessee, the Court pointed out that two of said decisions held notwithstanding, that if the parties cohabited as in a state of matrimony, an estoppel arose to defeat any property rights that either spouse might have if legally married.

To the further argument that the separation between Matilda and George Maynard Lott in 1928 would dissolve any relation existing between them even if a common-law marriage were established, the court ruled that in contemplation of law a common-law as well as a ceremonial marriage, once contracted, must continue until death or legal dissolution. Neither of the parties to a common-law marriage may dissolve the same "by a separation or marriage to another person. If the common-law marriage is to be recognized at all it must be recognized for all purposes. The law directing that it must be a contract *in praesenti* makes it effective immediately if followed by cohabitation. To hold otherwise would be permitting companionate or trial marriage. Such a situation would be obnoxious."

This decision was followed in 1936 by *In re Speeler*, discussed at the beginning of this article. With that challenging opinion, the record of common-law marriage decisions in Ohio for the time being comes to an end.

Conclusions

From the foregoing analysis of the reported cases, it is possible to summarize the position taken with regard to common-law marriages by the Ohio courts.

of the claimed language used by Matilda and George Maynard Lott in Tennessee followed by immediate cohabitation would have been sufficient under the laws of Ohio to constitute a common-law marriage had the claimed common-law contract taken place in this State. When Matilda and George Maynard Lott moved to Ohio and continued their cohabitation and all the relations of husband and wife, the law thereby supplies the imputation of renewal of their marriage agreement *in praesenti* even though there was an absence of any express declaration. The disability prescribed under the law of Tennessee is removed when the parties took up their abode in this State where common-law marriage is recognized. *Travers* v. *Reinhardt*, 205 U.S. 423, 440; *Jenkins* v. *Jenkins*, 30 O. App. 336 (6 Abs. 596); 26 O. Jur., p. 32, sec. 21."

1. Although based on *obiter dictum* in *Carmichael* v. *State*,[115] the construction in that case of the Ohio statutes regulating marriage has been followed by all the later decisions with the exception of *Bates* v. *State*.[116] The result is that, regardless of the provisions of Sections 11181 to 11198-1 of the General Code, common-law marriages, upon proof thereof, are held valid in Ohio even though they are not favored as a matter of policy.[117]

2. That in order to constitute a valid common-law marriage there must be

(a) An agreement to marry *in praesenti*;

(b) Cohabitation as husband and wife ensuing upon such agreement;

(c) Reputation in the community that the marital relationship exists.

The Ohio Supreme Court considers these three requisites essential.[118]

3. That a prior meretricious relationship between a man and woman may become a valid common-law marriage upon proof indicative of intent to enter into an agreement of present marriage, but fails for lack of such proof.[119]

4. That a marriage, either ceremonial or by consent, void because of the existence of an impediment, may become a valid common-law marriage upon continued cohabitation and repu-

[115] *Carmichael* v. *State*, 12 O.S. 553 (1861), *supra*, note 34.

[116] *Bates* v. *State*, 9 O.C.C. (N.S.) 273 (1906), *supra*, note 10.

[117] *Swartz* v. *State*, 13 O.C.C. 62 (1896), *supra*, note 40; *In re Barrett*, 49 Bull. 222 (1904), *supra*, note 46; *Drach* v. *Drach*, 9 O.N.P. (N.S.) 353 (1910), *supra*, note 54; *Umbenhauer* v. *Labus*, 85 O.S. 238 (1912), *supra*, note 53-59; *Howard* v. *Central Nat'l. Bank*, 21 O. App. 74 (1926), *supra*, note 83; *Johnson* v. *Wolford*, 117 O.S. 136 (1927), *supra*, note 87.

[118] *Umbenhower* v. *Labus*, 85 O.S. 238, 97 N.E. 832 (1912), *supra*, 53-59, and all cases cited.

[119] *Dirion* v. *Brewer*, 20 O. App. 298, 151 N.E. 818 (1925), *supra*, note 70; *Johnson* v. *Dudley*, 3 O.N.P. 196 (1896), *supra*, note 43; *Lumas* v. *Lumas*, 26 O. App. 502, 160 N.E. 480 (1927), motion to certify record overruled, 25 O. L. Rep. 638, *supra*, note 78; *Jenkins* v. *Jenkins*, 30 O. App. 336, 164 N.E. 790 (1928), *supra*, note 90.

tation following the removal of the impediment, the law implying a renewal of the marriage contract *in praesenti*.[120]

5. That the law of the place where the acts occurred upon which the marriage is sought to be established governs the creation of the marriage status. If a common-law marriage is not recognized in the jurisdiction in which consummation thereof is alleged, and the parties thereafter move to Ohio where such marriages are recognized, the illicit status accompanies them. In order to win legal recognition of their union in Ohio, they must comply with the rules of that State governing the creation of a common-law marriage.[121]

6. That evidence necessary to prove a common-law marriage must be clear and convincing.[122] There is some confusion, however, in the degree of proof required.

Thus, the *Drach*[123] decision held that a writing, acknowledging the marriage, alone was sufficient to prove its existence by the common law, though as a matter of fact there was cohabitation and publicity in that case. Oral proof of the contract is admissible in support of a common-law as well as ceremonial marriage by either the surviving spouse,[124] or persons acquainted with the facts[125] and circumstances. Conversations between husband and wife are permitted as essential to proving the contract.[126] On the other hand, a common-law marriage may be

[120] *Mieritz* v. *Insurance Co.*, 8 O.N.P. 422, 11 O.D. (N.P.) 759 (1901), *supra*, note 44; *Johnson* v. *Wolford*, 117 O.S. 136, 157 N.E. 385 (1927), *supra*, note 87; *Jenkins* v. *Jenkins*, 30 O. App. 336, 164 N.E. 790 (1928), *supra*, note 90.

[121] *Howard* v. *Central Nat'l. Bank*, 21 O. App. 74, 152 N.E. 784 (1926), *supra*, note 83; *Charrier* v. *State*, 29 C.C.N.S. 97 (1918), *supra*, note 66; *Industrial Commission* v. *Miller*, 18 O. L. Abs. 244 (1934), *supra*, note 107; *In re Twellman*, 32 O.N.P. (N.S.) 201 (1934), *supra*, note 102.

[122] *Umbenhower* v. *Labus*, 85 O.S. 238 (1912), *supra*, note 53; *Dirion* v. *Brewer*, 20 O. App. 298 (1925), *supra*, note 70; *Howard* v. *Central Nat'l Bank*, 21 O. App. 74 (1926), *supra*, note 83.

[123] *Drach* v. *Drach*, 9 O.N.P. (N.S.) 353 (1910), *supra*, note 54.

[124] *Umbenhower* v. *Labus*, 85 O.S. 238 (1912), *supra*, notes 53-59; *Howard* v. *Central Nat'l. Bank*, 21 O. App. 74 (1926), *supra*, note 83.

[125] *Days* v. *Thompson*, 3 O. L. Abs. 634 (1925), *supra*, note 68.

[126] *Holmes* v. *Pere Marquette Ry. Co.*, 28 O. App. 297 (1927), *supra*, note 89.

shown by the conduct of the parties, by evidence of cohabitation and reputation, even though the survivor to the alleged marriage has testified to an ambiguous contract.[127] Although doubtful at first, it was finally held that evidence of cohabitation and reputation might be submitted to a jury in a criminal as well as civil case.[128] Its sufficiency must be determined by them upon proper instruction by the court.[129]

7. That common-law marriages are indissoluble except by death or divorce.[130] The legal status, once established, is not affected by doubt as to its legality,[131] or by change of mind[132] on the part of either spouse.

In connection with the above rules, however, it should be noted that in 1927, the last occasion (except for the brief *Terrell*[133] decision in 1929) on which the Ohio Supreme Court considered a common-law marriage status, that court stated in *Johnson* v. *Wolford*:[134]

> Each and all of the cases which have been decided by this court bearing upon the subject of common-law marriages have been decided upon the peculiar facts of those cases, and it has not at any time been declared by this court that the limitations of those cases become binding limitations upon all future cases.

This may account for certain inconsistencies in the decisions.

[127] *Howard* v. *Central Nat'l. Bank*, 21 O. App. 74 (1926), *supra*, note 83.

[128] *Carmichael* v. *State*, 12 O.S. 553 (1861), *supra*, note 34; *Swartz* v. *State*, 13 O.C.C. 62 (1896), *supra*, note 40; *Bates* v. *State*, 9 O.C.C. (N.S.) 273 (1906), *aff.* in part 77 O.S. 622, *supra*, note 10.

[129] *Bates* v. *State*, 9 O.C.C. (N.S.) 273 (1906), *aff.* in part 77 O.S. 622, *supra*, note 10; *Drach* v. *Drach*, 9 O.N.P. (N.S.) 353 (1910), *supra*, note 54.

[130] *Swartz* v. *State*, 13 O.C.C. 62 (1896), *supra*, note 40; *In re Barrett*, 49 Bull. 222 (1904), *supra*, note 46; *Knight* v. *Shields*, 19 O. L. Abs. 37 (1935), *supra*, note 112.

[131] *Walker* v. *Walker*, 15 O.N.P. (N.S.) 189 (1913), *supra*, note 64.

[132] *In re Barrett*, 49 Bull. 222 (1904), *supra*, note 46.

[133] *Industrial Commission* v. *Terrell*, 120 O.S. 59, 165 N.E. 536 (1929), *supra*, note 106.

[134] *Johnson* v. *Wolford*, 117 O.S. 136, 157 N.E. 385 (1927), *supra*, note 87.

In spite of the strong affirmance by the Supreme Court[135] that common-law marriages are countenanced because the law favors the legitimacy of children, the Court of Appeals in 1929, in upholding a common-law marriage[136] necessarily made the children of a later ceremonial marriage illegitimate. Again, in the *Lumas*[137] case a common-law marriage was denied for lack of an agreement showing present intent, while in the *Jenkins*[138] case, such intent was implied, though the circumstances seem equally flagrant. Then too, the *Jenkins* case was decided on the authority of *Johnson* v. *Wolford*,[139] though in the latter case the Supreme Court held that the intent of the ceremonial marriage innocently contracted, carried over to the implied contract, once the impediment was removed, whereas in the *Jenkins* case, there had been no ceremonial marriage between the parties, each of whom had abandoned a living spouse.

[135] *Umbenhower* v. *Labus*, 85 O.S. 238 (1912), *supra*, notes 53-59; *Dirion* v. *Brewer*, 20 O. App. 298 (1925). Motion to certify record overruled, 23 O. L. Rep. 589, *supra*, note 70.

[136] *Duhigg* v. *Duhigg*, 31 O. L. Rep. 600 (1929), *supra*, note 80.

[137] *Lumas* v. *Lumas*, 26 O. App. 502, 160 N.E. 480 (1927). Motion to certify record overruled, 25 O. L. Rep. 628, *supra*, note 78.

[138] *Jenkins* v. *Jenkins*, 30 O. App. 336, 164 N.E. 790 (1928), *supra*, note 90.

[139] *Johnson* v. *Wolford*, 117 O.S. 136, 157 N.E. 385 (1927), *supra*, note 87.